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## **Decision-Making and the Dead: Who Decides the Funeral Arrangements When Families Disagree?**

Dr Heather Conway\*

Personal relationships and family structures in Northern Ireland are becoming increasingly diverse. This is not just challenging in life; anecdotal evidence suggests that it causes an increasing number of problems in death as well. An individual may leave behind a complex mix of personal and family ties when they die- for example, a spouse/civil partner; former spouse/civil partner; short or long-term cohabiting partner; children from different relationships; step-children; and parents and siblings to list but a few. Death often causes tensions within families, and funeral arrangements can be the first contentious issue- long before the thorny subject of inheritance. Most of the key decisions will be made amicably, and collectively. However, things are not always quite as straightforward (especially where families are fragmented), with disagreements over a range of things such as:

- whether the deceased should be buried or cremated
- the type of funeral service (eg. religious or non-religious; private, family funeral or funeral which is 'open' to everyone who wants to come along), where to hold it, and who should attend
- if opting for burial, which cemetery and in which grave (eg. existing family grave, or 'new' grave)<sup>1</sup>
- if opting for cremation, what happens to the ashes afterwards (eg. buried in an existing or new grave plot, scattered somewhere, kept at the home of a family member or divided between different relatives of the deceased<sup>2</sup>)

In the immediate aftermath of death, the focus will be on 'disposal' of the deceased's body, and the need to ensure that this occurs quickly for reasons of public health and respect for the dead- as well as the tradition in Northern Ireland for the funeral to take place within three days. If consensus or compromise cannot be reached, and attempts at mediation have failed, the matter may end up in the courts. The most likely course of

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<sup>1</sup> Further down the line, the wording on the deceased's headstone or grave marker may be another source of family conflict. For example, in *Re Campbell (Judicial Review)* [2013] NIQB 32, judicial review proceedings were brought against Derry City Council by the deceased's wife, following the council's decision to grant the right of burial over her husband's grave to the deceased's father and allow him (the father-in-law) to erect a headstone which did not mention the wife or the deceased's role as a 'loving husband.' The wife's application was dismissed on the facts of the case.

<sup>2</sup> Ashes can also be converted into novel memorials, such as certified diamonds incorporated into unique items of jewellery as offered by LifeGem Memorials (see [www.lifegem-uk.com](http://www.lifegem-uk.com) (accessed August 2014)).

action is to seek an injunction in the Chancery Division of the High Court (under the court's inherent jurisdiction), preventing the deceased's funeral from taking place.

Any legal action will be based on who has the right to decide the funeral arrangements and to claim possession of the deceased's remains for that purpose.

## **I. Funeral Directions Not Legally Binding**

The starting point is the old common law rule that there is no property in a dead body.<sup>3</sup> One consequence of this rule is that an individual's funeral directions are not legally binding- the theory being that, since a dead body is not property, a person cannot bequeath it according to the nineteenth century case of *Williams v Williams*.<sup>4</sup>

Directions in the deceased's will or other written document (eg. a pre-paid funeral plan, personal correspondence) about whether they want to be buried or cremated and the type of funeral ceremony etc carry no legal weight. However, clients should still be encouraged to set out their wishes if they have definite views on what should happen to their remains:

- Doing so provides a reference point for their family, and a clear indication of what the individual wanted.
- There are signs that courts are increasingly looking at the deceased's wishes when resolving family disputes over the funeral. This seems to be driven, in part, by potential arguments under Articles 8 and 9 of the European Convention on Human Rights- one example being *Burrows v HM Coroner for Preston*.<sup>5</sup>

## **II. Legal Framework**

The 'no property' rule means that no-one can claim ownership of the deceased's body as such. However, certain designated individuals have a legal duty to bury the dead and a right to possession of the deceased's remains for that purpose. The jurisdiction is not statutory, but is based on old common law rules around administration of estates and recovery for funeral expenses which result in full decision-making powers over what form the deceased's funeral should take. (Where the deceased has been cremated, the

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<sup>3</sup> See P Matthews, "Whose Body? People as Property" (1983) 36 Current Legal Problems 193.

<sup>4</sup> (1882) 20 Ch D 659. This remains the core authority today.

<sup>5</sup> [2008] 2 FLR 1225 and discussed in Pt III below.

same basic rules apply if there's a conflict over what should happen to the ashes afterwards.)

These old rules set out a clear order of entitlement, and have been applied in quite a few cases where courts have had to settle disputes between members of the deceased's family. There are very few reported cases from Northern Ireland. However, there is a growing volume of English case law which covers a lot of issues which might arise here in the future, as well as cases from other common law jurisdictions (especially Australia and Canada) which deal with similar family disputes and are decided under the same legal framework as ours.

### **1. Testate Deaths: Decision Lies with the Executor**

Where the deceased made a will, the final decision lies with the executor,<sup>6</sup> who is entitled to possession of the body even before the grant of probate.<sup>7</sup> In practice, the executor will usually leave the family to make the funeral arrangements (especially where the executor is not a family member). However, if a dispute occurs over the arrangements, the law favours the deceased's executor- even if this means overruling the wishes of immediate family:

- *Murdoch v Rhind*<sup>8</sup>- the executor was granted an injunction to prevent the deceased's wife from cremating her husband's remains (and in doing so, fulfilled the deceased's wish to be interred in the family burial plot).
- *Grandison v Nembhard*<sup>9</sup>- the court refused to interfere with the executor's plan to repatriate the deceased's remains for burial in his native Jamaica (again, in accordance with the deceased's wishes), and despite objections from the deceased's only daughter who wanted to bury her father in England where he had lived since 1960.

The fact that the executor was intent on doing what the deceased wanted in these cases was incidental, and an executor has the final decision even if he/she is disregarding the deceased's burial preferences:

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<sup>6</sup> See *Williams v Williams* (1882) 20 Ch D 659, *Murdoch v Rhind* [1945] NZLR 425 and *Grandison v Nembhard* [1989] 4 BMLR 140.

<sup>7</sup> Since an executor derives title from the will itself (*Buchanan v Milton* [1999] 2 FLR 844), his/her authority dates from the death of the deceased.

<sup>8</sup> [1945] NZLR 425.

<sup>9</sup> [1989] 4 BMLR 140.

- *Hunter v Hunter*<sup>10</sup>- the deceased was a staunch Protestant but had converted to Catholicism a few days before his death, so that he could be buried beside his devoutly Catholic wife. The deceased's son and executor insisted on the deceased having a Protestant burial; the court ruled in the son's favour.

One way around this may be to include some sort of conditional bequest for the executor- eg. a sum of money on condition that they carry out the deceased's request to be buried/cremated, have his/her remains interred in a particular place etc. Otherwise, because the executor has the legal right to dispose of the body, it is for them to decide how and where the funeral will take place. An executor can also prevent alternative funeral arrangements from going ahead- usually by seeking an injunction to this effect.

However, bear in mind the following two possibilities:

### ***(i) Doubts Over a Will's Validity***

The executor rule may be dispensed with where there are doubts over the validity of the will from the very outset.<sup>11</sup> If the prospect of a will being granted probate seems unlikely due, for example, to fraud, lack of capacity or non-compliance with the legal formalities<sup>12</sup> the court can authorise someone else to make the funeral arrangements.

- *Privet v Vovk*<sup>13</sup>- an elderly stroke patient in a nursing home had married her much younger male carer several months before her death, and made a new will appointing him as executor (the same will also left him the bulk of her estate). The court ruled that the deceased's son should make the arrangements for her funeral; given the deceased's mental state, the court had serious doubts over the validity of both the will and the marriage.

Of course, this assumes that these issues come to light and are raised in the immediate post-mortem period.

### ***(ii) Executor Declines to Act***

An executor can renounce their executorship and decline to act (for example, if an 'independent' executor is aware of family discord over the funeral arrangements and

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<sup>10</sup> (1930) 65 OLR 586.

<sup>11</sup> *University Hospital Lewisham Trust v Hamuth* [2006] EWHC 1609 (Ch).

<sup>12</sup> Under the Wills and Administration Proceedings (NI) Order 1994, art 5. Undue influence could also be raised here.

<sup>13</sup> [2003] NSWSC 1038.

doesn't want to be involved), in which case the court must revert to the next-of-kin framework to resolve the matter.

## **2. Intestate Deaths: Decision Lies with the Highest Ranking Next-of-Kin**

If the deceased died intestate (which will probably account for the majority of deaths in Northern Ireland), the final decision falls on the highest ranked next-of-kin who would be entitled to a grant of administration over the deceased's estate if one were sought.<sup>14</sup>

Part II of the Administration of Estates Act (NI) 1955 sets out a descending order of entitlement based on the individual's relationship to the deceased, namely his/her:

- Surviving spouse or civil partner<sup>15</sup>
- Children- including unborn,<sup>16</sup> adopted<sup>17</sup> and non-marital children<sup>18</sup> as well as children born by assisted reproduction in a variety of scenarios (including posthumous reproduction)<sup>19</sup>
- Parent(s)
- Sibling(s)
- Other specified relations in descending order of consanguinity

The person who has the highest right to be granted letters of administration has the final say as regards funeral arrangements.

Unlike executors, administrators do not take title from the date of death, but from the grant of letters of administration which is at least 7 days (or 28 days in the case of a surviving spouse or civil partner<sup>20</sup>). Despite suggestions to the contrary in one English case,<sup>21</sup> it is irrelevant that no grant has actually been made or applied for; the person *due to be granted letters of administration* or who *would be entitled if they made a formal application* has the right to possession of the deceased's remains and to decide the funeral arrangements.<sup>22</sup>

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<sup>14</sup> See *Dobson v North Tyneside Area Health Authority* [1996] 4 All ER 474, as well as *Saleh v Reichert* (1993) 104 DLR (4<sup>th</sup>) 384 and *Smith v Tamworth City Council* (1997) 41 NSWLR 680.

<sup>15</sup> Same-sex civil partners in Northern Ireland (and the rest of the UK) have exactly the same legal rights as spouses under the Civil Partnership Act 2004.

<sup>16</sup> 1955 Act, s 13.

<sup>17</sup> Adoption (NI) Order 1987, art 40.

<sup>18</sup> Family Law Reform (NI) Order 1977 (see also the Children (NI) Order 1995).

<sup>19</sup> Human Fertilisation and Embryology Act 2008, Part II.

<sup>20</sup> Due to the survivorship stipulation in s 6A of the Administration of Estates Act (NI) 1955.

<sup>21</sup> *Dobson v North Tyneside Area Health Authority* [1996] 4 All ER 474.

<sup>22</sup> *Holtham v Arnold* [1986] 2 BMLR 123, *Brown v Tulloch* (1992) 7 BPR 15101 and *Meier v Bell*, Supreme Court of Victoria, unrep, 3 March 1997.

Even if a grant of representation is highly unlikely because the deceased's estate is very small (nor even non-existent), the position is still the same.<sup>23</sup>

***(i) The Emphasis is on Legally Designated Next-of-Kin***

To have full decision-making powers over the deceased's funeral, the individual must fall within the legal definition of next-of-kin under the intestacy statute.

- *R (on the application of Haqq) v HM Coroner for Inner West London*<sup>24</sup>- the deceased was domiciled in England and already married when he entered into a 'second' marriage in Bangladesh; the fact that the second marriage was void under English law meant that the 'first' wife was entitled to her husband's remains as the highest ranked next-of-kin.

Much more problematic is the fact that the current intestacy framework in Northern Ireland does not recognise certain individuals as next-of-kin. The biggest gap is unmarried cohabitants, who may find that they have no rights to arrange their partner's funeral if challenged by the deceased's children, parents or siblings etc.

- *Holtham v Arnold*<sup>25</sup>- the deceased's estranged wife insisted on cremating his body despite the fact that he had left her and his six children years earlier, and was living with someone else. His long-term partner wanted to bury the deceased in accordance with what she claimed were his wishes. However, Hoffman J (as he then was) ruled in favour of the wife as her husband's highest ranking next-of-kin.

The only way of avoiding this would be to ensure that cohabiting partners (especially those in long-term, committed relationships) appoint each other as executor under their respective wills- something to bear in mind when advising cohabitants about their legal rights vis-à-vis each other.

Step-children who were not adopted by the deceased are also excluded from the definition of next-of-kin for intestacy purposes, and would have no say in the funeral arrangements for a step-parent.

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<sup>23</sup> *Dow v Hoskins* [2003] VSC 206.

<sup>24</sup> [2003] EWHC 3366 (Admin).

<sup>25</sup> [1986] 2 BMLR 123.

## ***(ii) Deaths of Infants/Minors***

Even though an infant or minor does not usually leave an estate, the duty to bury a dead child falls jointly on the parents because they would be entitled to a grant of administration if one were needed.<sup>26</sup>

Parents can disagree over the funeral arrangements for their child- usually where the parents have divorced or separated. Case law suggests that courts apply various rules here (these are mentioned below).

What about disputes between different *sets* of parents?

### ***Natural Parents vs. Adoptive Parents***

The rights of adoptive parents prevail over those of natural or biological parents, which is hardly surprising given the permanency of the adoption process and its legal consequences.<sup>27</sup>

### ***Natural Parents vs. Foster Parents***

While we might assume that natural parents outrank foster parents (given that fostering tends to be a temporary care arrangement), case law suggests a more fact-specific approach.

In *R v Gwynedd County Council, ex p B*<sup>28</sup> the court ruled in favour of the natural mother who wanted to bury her daughter beside the child's father in the family burial plot, despite objections from the girl's foster parents who had cared for her since she was a few weeks old<sup>29</sup> and wanted to bury the child where she had lived for most of her life and had many friends. The role of the local authority (which had placed the child with foster parents) ceased on death, at which point the duty to bury reverted to the natural parents. However, the court did stress that the position might be different if the natural parents could not be found or were unwilling to act.<sup>30</sup>

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<sup>26</sup> *Scotching v Birch* [2008] EWHC 844 (Ch).

<sup>27</sup> See *Buchanan v Milton* [1999] 2 FLR 844.

<sup>28</sup> [1992] 3 All ER 317.

<sup>29</sup> The deceased was disabled and was voluntarily placed into care because her parents were unable to cope; her father died when his daughter was four.

<sup>30</sup> See also *Warner v Levitt*, Supreme Court of New South Wales, unrep, 23 August 1994- natural parents do not lose their right to bury a dead child because of separation or maltreatment, or both.



Contrast this with Deeny J's decision in *Re LL (Application for Judicial Review)*<sup>31</sup> which involved a dispute over a terminally ill 11 year old boy, the child's mother wishing to bury him in the same grave as her grandfather in Millisle, and the foster parents wanting to bury him in Clandeboyne Cemetery near Bangor which was close to where the boy had lived with them and their three daughters since being placed in care seven years earlier. The court ruled in favour of the foster parents; the child had been freed for adoption without parental agreement two years earlier, and art 12 of the Adoption (NI) Order 1987 extinguished all parental rights and duties from the date of that order. The court also noted that the mother (whose only connection with her son since he was taken into care had been a single visit and some goodwill cards) could have applied to court to discharge the 'freeing order' when adoption had not occurred within the following 12 months but had failed to do so.

As a result, the health trust with responsibility for the child could allow the foster parents who had loved the child and cared for him for many years to arrange the funeral. Another interesting feature is the fact that the child was still alive in this case, though terminally ill and expected to die within a very short time. However, courts in other jurisdictions have refused to make a pre-emptive ruling in similar circumstances.<sup>32</sup>

### ***(iii) Separating Equal Claims?***

Who gets the final say on the deceased's funeral where two or more individuals have equal rights on intestacy- for example, siblings fighting over the funeral arrangements for a dead parent or another sibling;<sup>33</sup> separated parents fighting over the fate of a dead child (whether infant/minor or adult)?

Here, the intestacy framework does not provide a solution because the parties have equal rights. There are no reported NI cases on the matter, but cases from other jurisdictions suggest that courts will look at various factors when deciding who gets the final say:

- The practicalities around burial/cremation without unreasonable delay seem to be a key factor. Courts will look at which party has already made provisional funeral

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<sup>31</sup> [2005] NIQB 83.

<sup>32</sup> *Re JSB (A Child)*; *Chief Executive, Ministry of Social Development v TS* [2009] NZHC 2054.

<sup>33</sup> Assuming, in the latter scenario, that the dead sibling does not have legally closer kin (eg. spouse/civil partner, or children).

arrangements, how far advanced they are, and whether the body will have to be moved any great distance.<sup>34</sup>

- The deceased's ties to a particular place (both negative and positive) are also important. Is one person intending to bury the deceased close to where they or their family lived (and had emotional ties); if the deceased died suddenly or tragically, would it be acceptable to bury the deceased/scatter the ashes close to where they died?

A good illustration is *Fessi v Whitmore*<sup>35</sup> where separated parents disagreed over the fate of their 12 year old son's ashes. The court awarded custody of the ashes to his mother for scattering in Nuneaton (a small town outside Birmingham) where the entire family had always lived; the father's proposal to inter the ashes in Wales where he and his son had moved a few weeks before the child's accidental death would cause "enormous distress"<sup>36</sup> being so near to the scene of the tragedy and so far away from where the boy had spent most of his life.<sup>37</sup>

- Other factors have emerged, though the weight attached to them varies significantly. For example, courts may be inclined to rule in favour of a custodial parent in disputes involving infant or minor children<sup>38</sup> but this practice is by no means universal,<sup>39</sup> and diminished levels of contact between parent and child are not always determinative.<sup>40</sup>
- The distance of each protagonist from the chosen gravesite and ease of access for future visiting may be relevant.<sup>41</sup>
- The court will *occasionally* decide on the basis of which person had the closer relationship with the deceased.<sup>42</sup>

The same broad principles are applied where there is a dispute between joint executors under a will.

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<sup>34</sup> *Calma v Sesar* (1992) 106 FLR 446 and *Burrows v Cramley* [2002] WASC 47.

<sup>35</sup> [1999] 1 FLR 767.

<sup>36</sup> *Ibid*, at 770.

<sup>37</sup> See also *Scotching v Birch* [2008] EWHC 844 (Ch) and *Hartshorne v Gardner* [2008] EWHC B3 (Ch).

<sup>38</sup> As in *AB v CD* [2007] NSWSC 1474.

<sup>39</sup> In both *Burrows v Cramley* [2002] WASC 47 and *Fessi v Whitmore* [1999] 1 FLR 767 the respective fathers lost despite being the custodial parent.

<sup>40</sup> As in *Scotching v Birch* [2008] EWHC 844 (Ch) where the father's wishes prevailed despite having had no contact with his son for several years.

<sup>41</sup> Contrast *Burrows v Cramley* [2002] WASC 47 with *Hartshorne v Gardner* [2008] EWHC B3 (Ch), though the geographical distance was greatest in the former.

<sup>42</sup> *Keller v Keller* [2007] VSC 118.

Note however, that where the deceased has been cremated and the dispute is over what happens to the ashes, the court will not order the ashes to be divided as a compromise solution if one party is fundamentally opposed to this- for example, the father did not want his son's ashes divided in *Fessi*.

### III. Displacing These Entitlements?

The executor or highest ranking next-of-kin will usually have the final say. However, there may be ways of challenging this if, for example, another family member feels that they should be entitled to make the funeral arrangements.

*Burrows v HM Coroner for Preston*<sup>43</sup> involved competing claims to the remains of a 15 year old boy who had committed suicide while detained in a young offender institution. Faced with deciding whether the funeral arrangements should be made by the deceased's estranged mother<sup>44</sup> or by an uncle with whom the boy had resided for eight years before his death, the court ruled in favour of the uncle. The mother was intent on burying her son despite acknowledging that this was contrary to his wishes. The deceased had made it clear on several occasions that he wanted to be cremated (he had mentioned, amongst other things, a fear of worms), and the uncle intended to fulfil his nephew's wishes.

- The judge in *Burrows* held that the right to respect for private and family life under Article 8 of the ECHR required the deceased's own views about his/her funeral arrangements to be taken into account. (Presumably similar arguments could be made under Article 9, if there is a freedom of religion point).
- Section 116 of the Senior Courts Act 1981 in England & Wales was then used to circumvent the mother's entitlement as highest ranking next-of-kin. Section 116 allows the court to pass over a personal representative where it is "necessary or expedient" to do so "by reason of any special circumstances", and there are several English cases suggesting that this provision can be used in burial disputes.<sup>45</sup>

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<sup>43</sup> [2008] 2 FLR 1225.

<sup>44</sup> A recovering heroin addict who'd had little contact with her son for years.

<sup>45</sup> For example, *Buchanan v Milton* [1999] 2 FLR 844. The decision in *Holtham v Arnold* [1986] 2 BMLR 123 (that s 116 is only concerned with administration of estates and not burial matters) must be regarded as incorrect on this point.

The Northern Ireland equivalent to s 116 is art 5 of the Administration of Estates (NI) Order 1979.<sup>46</sup>

Succession law mechanisms aside, there is nothing to stop specific Convention rights being pleaded in disputes over funeral arrangements more generally. For example, a surviving cohabitant who does not have any rights on intestacy may be able to argue that he/she constitutes family for the purposes of Article 8 of the ECHR and should therefore have the final say on the deceased's funeral.<sup>47</sup>

## **Conclusion**

Any family death is an emotionally charged event, and has the potential to resurrect old grievances and reignite latent power struggles. Disputes over the funeral are just another example of this. Unfortunately, there is no way to prevent families from fighting over a loved one's funeral arrangements; the best course of action is to try to pre-empt them, by encouraging clients to take sensible steps in advance.

Even though funeral directions are not legally binding, clients should be encouraged to state in their wills or other formal documents what they want to happen to their remains on death. Clients should be advised about any potential problems around their funeral arrangements and encouraged to discuss what they want with their executor and/or family so that everyone is aware of their wishes in advance (even if many people are reluctant to have these sorts of conversations). This will be important where the person is, for example, in a cohabiting relationship, second marriage and/or has children from different relationships, or where they want a 'non-traditional' or very specific type of funeral. In short- practitioners need to be alert to the potential for post-mortem conflict in these situations, and not just around the person's estate, because the funeral could well be the first 'pressure point' when a client dies.

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<sup>46</sup> However, art 35 of the Wills and Administration Proceedings (NI) Order 1994 can also be used here prior to the grant being extracted, as well as afterwards). I am grateful to Sheena Grattan BL for providing me with the NI equivalents.

<sup>47</sup> Depending on the facts, similar arguments could be made by the deceased's fiancé(e) or foster parents, or by others having some sort of close emotional and/or relational tie to the deceased.